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The State of Utah v. Ross Lindsay : Brief of Appellant

Utah Court of Appeals

DOCKET NO. 890543-CA IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff, vs. ROSS LINDSAY, Defendant.	)	BRIEF OF THE APPELLANT Case No. 890543-CA

APPEAL FROM THE SIXTH JUDICIAL DISTRICT COURT

OF WAYNE COUNTY

FROM THE PROCEEDINGS HELD BEFORE JUDGE DON B. TIBBS

AND FROM THE JUDGMENT AND SENTENCE ENTERED BY JUDGE DAVID MOWER

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ARGUMENT PRIORITY CLASSIFICATION: TWO

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State v. Troy, 688 P.2d 483 (Utah, 1984)

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STATEMENT OF JURISDICTION

The Defendant/Appellant appeals from rulings made preliminary to and at the course of a trial held in the Sixth Judicial District Court for Wayne County which resulted in a jury verdict on February 27, 1989, and from the Denial of the following Post-trial Motions:

(1) Motion for New Trial - Filed April 18, 1989, and the Order denying said Motion entered on July 14, 1989; and

(2) Motion in Arrest of Judgment - Filed July 17, 1989, and the Order entered denying said Motion on July 14, 1989.

The Notice of Appeal dated July 14, 1989, was filed with this Court on September 5, 1989.

NATURE OF PROCEEDINGS

This is an appeal of rulings made preliminary to and at the course of a trial held in the Sixth Judicial Court of Wayne County, and from a denial of Post-trial Motions. Defendant/Appellant was charged with 8 separate counts of theft of cattle, and convicted by a jury on February 27, 1989.

STATEMENT OF ISSUES

The issues presented by the Appeal expressed in terms and circumstances of the case are set forth as follows:

Issue No. 1, Juror Bias and Improper Conduct: Should a new trial be granted in view of the fact that one of the jurors was a close friend and former employee of one of the key witnesses and alleged owner of the cattle, and that one of the jurors had previously arrested one of the witnesses for an identical offense. Should a new trial be granted because some jurors had been seen speaking to witnesses during the recess of the trial.

Issue No. 2, Separate Offenses: Was the fact that multiple charges were filed and the Defendant/Appellant was found guilty of multiple claims error and prejudicial to the Defendant/Appellant's rights in view of the fact that only one group of 8 head of cattle were referred to during the course of the trial and in the indictment, and that separate elements of intent were not alleged or proven, and that the alleged offenses should all have been included in one count.

Issue No. 3, Denial of Equal Protection: Is the charging statute, Utah Code Ann. 76-6-412 unconstitutional on the basis that it denies the Defendant/Appellant equal protection under the law in that it establishes the alleged crime of which the Defendant/Appellant was charged as a felony without reference to the specific value of the items referred to, whereas the remaining provisions of the section require certain monetary limits in order to qualify for the various levels of felony convictions.

Issue No. 4, Venue: Did the Court improperly deny the Defendant/Appellant's Motion for Change of Venue in that all residents of the small community of Loa, in which the trial occurred, were essentially aware of the case through pre-trial publication and rumors which were widely disseminated throughout the entire community and county.

Issue No. 5, Opinion Testimony: Was it improper to admit testimony of Clyde B. Argyle and A.C. Ekker over the objection of the Defendant/Appellant through his counsel because it was based on hearsay, there was lack of foundation, and inadequate basis for an opinion?

Issue No. 6, Business Records: Was it improper to admit Plaintiff's Exhibit 2 into evidence under a business record hearsay exception when the only identification of such records was by the brand inspector who was not an employee of the stockyard and had no personal knowledge of the operation of the business?

Issue No. 7, Requirement of Original: Was it improper to admit Plaintiff's Exhibits 3 and 6 for lack of foundation as the originals were easily obtainable?

Issue No. 8, Improper Closing Remarks: Should a reversal be granted on the basis of improper remarks made by the prosecution in his closing statement to the effect that the Defendant/Appellant was not only guilty of this crime but a number of other crimes for which he should be punished?

Issue No. 9,Irrelevant Testimony: Was it improper to admit testimony of A.C. Ekker as to previous reports and apprehensions

for lack of relevancy?

Issue No. 10, Sentencing: Was there an improper sentencing procedure in that the same judge who tried the case did not impose the sentence when he either was or would have soon been available to impose the sentence. Did the sentencing judge rely upon evidence which was beyond the scope which should have reasonably been considered in view of statements made by the claimed owner of the cattle at the sentencing that rustling by airplanes had occurred in the area, that it was a serious problem, and that this Defendant/Appellant should be harshly punished as an example to other parties to prevent airplane rustling?

Issue No. 11, Insufficiency of and Variance of indictment: Is some evidence as to the time of taking required to be provided either in the indictment or at the trial so as to allow the Defendant/Appellant to be able to defend himself on due process grounds, and should the Defendant/Appellant's conviction be reversed in the absence of any such evidence in view of the fact that the Defendant/Appellant gave evidence as to alibi, which imposed upon the state a higher burden than it would otherwise have had to then come forward with a specific time of taking other, than during the period when the Defendant/Appellant had an alibi as to his whereabouts? When evidence at the trial revealed a corporation allegedly owned the cattle, did that constitute a variance?

Issue No. 12, Prior Bad Acts: The Defendant/Appellant was originally charged with fraudulently uttering and altering title to cattle, which charge was dismissed prior to the trial. In view of this dismissal was it prejudicial to allow testimony in during the trial concerning said instrument over the objection of Defendant/Appellant's counsel when there was no issue before the court on this question.

Issue No. 13: With respect to each evidentiary question the issue arises as to whether or not the prejudicial effect outweighed its probative value and, if so, whether or not the admission of said evidence was likely to have had a material effect on the outcome of the trial.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Amendment V, Constitution of the United States.

Amendment VI, Constitution of the United States.

Amendment VIII, Constitution of the United States.

Amendment XIV, Constitution of the United States.

Article I, Section VII, Constitution of Utah.

Article I, Section IX, Constitution of Utah.

Article I, Section XII, Constitution of Utah.

Article I, Section XXIV, Constitution of Utah.

Rule 59 (a)(2) Utah Rules of Civil Procedure.

Section 78-13-9 (2) Utah Code Annotated.

Section 76-6-412 Utah Code Annotated.

Section 76-1-401 Utah Code Annotated.

Rules 17, 18, 19, 24 and 29 (e)(i) and (ii), Utah Rules of Criminal Procedure.

Rules 402, 403, 404(b), 701, 802, Utah Rules of Evidence.

STATEMENT OF THE CASE

A. Nature of the Case: This is an appeal of rulings made preliminary to and at the course of a trial held in the Sixth Judicial Court of Wayne County, and from a denial of Post-trial Motions. Defendant/Appellant was charged with 8 separate counts of theft of cattle, and convicted by a jury on February 27, 1989.

B. Course of Proceedings and Disposition at Trial Court: An information was filed by the Wayne County District Attorney charging the Defendant/Appellant with 8 separate counts of theft of cattle pursuant to Section 76-6-412, Utah Code Ann. Numerous Pre-trial Motions were made by both parties to the matter, the most significant of which for purposes of this appeal are the Motions for Change of Venue, to allege one third degree felony and to Suppress Evidence, all of said motions having been denied. The trial was conducted regularly except that bias of certain jurors were not revealed at voir dire, jurors were seen talking with the prosecution's key witness during the course of the trial, several exhibits and testimony were allowed over objection, and the Prosecutor made improper remarks in his closing argument. Defendant/Appellant was convicted by the jury on all 8 counts, was sentenced a fine of Fifty Thousand Dollars ($50,000.00, Thirty-five Thousand ($35,000.00) of which was suspended), restitution in the amount of One Thousand Seven Hundred Dollars and Thirty-three Cents ($1,717.33), a suspended prison sentence, and one year in the Wayne

County Jail with probation. Defendant/Appellant's Motion for Arrest of Judgment based upon the late amendment to the information was denied, as was the Defendant/Appellant's Motion for New Trial. The Notice of Appeal was filed with this Court on September 5, 1989.

C. Relevant Facts:

1. On March 11, 1987, Defendant/Appellant brought 8 head of cattle to the Spanish Fork Livestock Auction for the purpose of selling them. See Trial Transcript page 191. 2. Ever since the Lindsays have been married, they have raised horses and cows. See page 166 of the Trial Transcript.

3. The cows were utilized for the purpose of training horses. See page 167 of the Trial Transcript.

4. The cattle were small, had long horns, did not have any tags, were unbranded, and had red sand on their back. See page 106 of the Trial Transcript.

5. Mr. Argyle testified in the preliminary hearing that red sand could appear in three different regions in Utah. See Reply to State's Memorandum, Paragraph 4 at page 45 of the Record.

6. Dependant/Appellant testified there was brownish red sand in and about his property. See page 224 of the Trial Transcript.

7. Mr. A. C. Ekker testified that based on conversations with another party who was not present as a witness, it was his

opinion that the cattle were his. See page 86-87 of the Trial Transcript.

8. Mr. Ekker never saw the cattle. See page 92 of the Trial Transcript.

9. The sheriff of Wayne County is the cousin of the alleged victim. One of the jurors had worked for the alleged victim, and another juror was previously a law enforcement officer who had actually arrested one of the witnesses in the case, Don Hatch, for the identical things which the Defendant was found guilty. See Defendant/Appellant's Supplement for Motion for New Trial, paragraph 3 of page 250 of the Record.

10. Two of the jurors conversed with A. C. Ekker during the course of the trial. See Trial Transcript, page 302 and Supplement to Motion for New Trial, paragraph 3 of page 250 of the Record.

11. The prosecution, despite repeated demands, failed to amend the information to allege the time of taking. See Response to Demand for Place, Date and Time of Offenses, pages 60-61 of the Record.

12. The prosecution, in closing, made improper remarks concerning prior criminal acts committed by Defendant/Appellant. See Supplement to Motion for New Trial page 249-252 of the Record, and Transcript of said Motion, page 18.

13. The evidence in the trial indicated the ownership of the alleged stolen cattle was not the same as in the information,

but was a different entity. See page 67 of the Trial Transcript.

14. The various objections made to the introduction of certain exhibits and testimony are cited to the Record in the appropriate arguments set forth below.

SUMMARY OF ARGUMENT

Defendant/Appellant was wrongfully convicted by a biased jury some of whom had spoke to a prosecution's key witness during the course of the proceedings, for 8 separate counts of livestock theft of unbranded cattle. The information did not state the time of taking, and was amended late in the proceedings to include the true alleged owner of the unbranded cattle. Defendant/Appellant was somewhat of an outsider to the small ranching communities of Wayne County, there had been previous reports of thefts in the area, and word had spread about the community concerning the thefts making the formation of an impartial jury very difficult. Although the alleged theft constituted one criminal episode, Defendant/Appellant was denied equal protection under the law by being convicted on 8 separate counts. Certain evidence was admitted over objection that alluded to other offenses which charges were dismissed by the Circuit Court, and certain hearsay, lay opinion and evidence without proper foundation was admitted over objection. The sentencing procedure was improper in that another Judge conducted the hearing and imposed the sentence, and may have wrongfully relied on evidence of other types of theft to excessively punish Defendant/Appellant as an example.

ARGUMENT

I. Change of Venue: Pursuant to Rule 29(e), U.R. Cr. Proc. Defendant/Appellant filed a Motion supported by Affidavit for Change of Venue. Loa is a very small, basically ranching community in Wayne County where the alleged victim was well known and respected. Defendant/Appellant was new to the area and was somewhat of an outsider. Previous thefts of cattle had been widely reported in the area, and was a cause of great concern in the ranching community. On voir dire, several of the jurors admitted hearing rumors about the thefts, one was dismissed because, based on the rumors, she thought the Defendant/Appellant was guilty, and many of the jurors had prior dealings with the Prosecutor. Given these factors, it was an abuse of discretion of the Trial Court not to grant the Motion for Change of Venue.

A Motion for Change of Venue was extensively reviewed and granted in State v. James, 767 P.2d 549 (Utah, 1989). The Court labeled four factors to be taken into consideration:

1.The standing of the victim and the accused in the Community;

2.The size of the community;

3.The nature and gravity of the offense;

4.The nature and extent of publicity.

The Court noted that it must "take the totality of the circumstances into account" (i.d. at P. 552).

As previously stated, Defendant/Appellant was somewhat of an outsider, not having lived in the area for that many years, whereas the alleged victim was well respected in the community as belonging

to a cattle raising family for several generations. Immediately a presumption was raised in the community eyes that Defendant/Appellant must be guilty.

Loa is a very small community consisting mostly of cattle and agricultural enterprises. The Court in James cited a U. S. Supreme Court Case, Nebraska Press Association vs. Stewart, 427 U. S. 539, 49 L.Ed. 683 (1976) indicating the smaller the community the more likely there will be a need for a change in venue. The apparent bias of some of the jurors (argued supra), substantiates that a fair and impartial jury would be nearly impossible for a crime such as this in an agricultural community such as Loa. One of the jurors was a former employee of the alleged victim, another juror was a former police officer who arrested an alleged accomplice of Defendant/Appellant, and other jurors were friends of the alleged victim. The community the Court was considering in the James case was Logan, which is immensely more populous than the community at issue here.

As to the nature and gravity of the offense, cattle theft in a community where much of its economic support is based on cattle raising becomes a much more serious offense than the total value of the alleged stolen property ($1,717.33) indicates. Even the prosecution in the sentencing argued that due to the geography of the area, which makes policing the cattle very difficult, it is indeed a serious offense. See Transcript of Sentencing Hearing, page 6. Mr. A. C. Ekker also testified at the sentencing hearing

indicating that such an offense should be taken very seriously (Id, pages 8 and 9).

As already stated, there had been previous thefts and trials concerning livestock thefts in the region, of which the whole community was aware of. Evidence was introduced to the Trial Court that a man who was present at the preliminary hearing was surprised to find that most people, including Court personnel, had already deemed Defendant/Appellant to be guilty. See Affidavit in Support of Motion to Change Venue, Pages 83-85 of the Record. Several of the jurors admit knowing of previous cattle thefts in the areas that, coupled with the fact that Defendant/Appellant did not have particularly high standing in the community, and was connected with a convicted cattle rustler, raised presumptions in most of the jurors minds that the Defendant/Appellant was guilty.

The Court in James,finding all of the above factors present, ruled a Motion for Change of Venue should have been granted by the Trial Court, and it was an abuse of discretion for the Trial Court not to do so. A summary review of the trial transcript will show that this was small town justice, inflicted upon an outsider, and constitutes a violation of Defendant/Appellant's constitutional rights contained in Amendment VI to the Constitution of the United States, and Article I, Sections 7, 10 and 12 of the Constitution of Utah.

II. Improper Admission of Opinion Testimony: On page 86 and 87 of the Trial Transcript, A. C. Ekker testified over

Defendant/Appellant's objection, that based on conversations with another party who was not present as a witness, it was his opinion that the cattle were his. On page 92 of the transcript, Mr. Ekker indicated that opinion was based entirely upon what he was told by someone else and that he never saw the cattle. Similarly, Mr. Argyle testified on Page 108, over Defendant/Appellant's objection, that it was his opinion that the cattle must have come from the Robbers Roost Allotment, although at the preliminary hearing, Mr. Argyle had testified red sand could have come from 3 different regions. See Reply to State's Memorandum, paragraph 4, at page 45 of the Record. Mr. Argyle also indicated this opinion was based upon a conversation with another person who was not present as a witness, and that he had never seen cattle of this particular type before. Neither of these witnesses were certified as experts by the prosecution.

Said opinions should have been excluded for two reasons, (1) they were based on hearsay; and (2) they went beyond the limited scope that Rule 701, Utah Rules of Evidence imposes on lay opinions. Both witnesses testified their opinion was based on conversations with other persons who were available, but were not present in the Courtroom for cross examination. The fundamental principal behind the hearsay rule (Rule 802, Utah Rules of Evidence),is so an accused's rights to cross-examine witnesses will not be infringed upon. Both witnesses drew an inference as to where the cattle came from based on the mere unsubstantiated fact that there was red sand on the cattle. The Defendant/Appellant

gave testimony on page 227 of the Trial Transcript that the cattle were standing in reddish-brown sand. This Court should certainly take judicial notice that red sand appears in literally thousands of acres range land in different areas throughout the state and the region, and is not limited only to the vicinity of the Robbers Roost Allotment.

In the matter of the Hock's Estate, 655 P.2d 1111, (Utah - 1982), the Court recognized that admission of evidence based on hearsay was error. Although the Court did find that it was harmless error, because it was not relevant to an ultimate issue in the case, in this matter it was extremely relevant as to where the cattle came from, because, as argued infra, the community including the jury were concerned with cattle thefts in the area and thought they were protecting one of its leading and respected cattle operators. A. C. Ekker was not even aware and did not report that any of this group of cattle were stolen. See Trial Transcript pages 77, 78. Certainly the opinions of an owner who had not even seen the cattle, and a brand inspector who admittedly based his opinion on the conversation with another man, constitutes prejudicial error requiring reversal.

Rule 701 limits opinion testimony by lay witnesses to those which are: "(a) rationally based on perception of the witness . ." Both the witnesses opinions were not rationally based on the perception of that witness, because they were admittedly based on conversations with other persons. In Edwards vs. Didericksen, 597 P.2d 1328 (Utah, 1979) and in Highland Constr. Co. vs. Pac. R.R.,

683 P.2d 1042 (Utah, 1984), the Court reaffirmed the rule that opinion testimony may not be based on hearsay evidence. The combined affect of both these witnesses opinions was prejudicial to Defendant/Appellant and again constitutes reversible error.

III. Improper Admission of Business Records: On page 103 of the trial transcript Defendant/Appellant objected to the admission of Plaintiff's Exhibit Number Two, in that it was a business record from a company that the witness was not an employee of and had no personal knowledge of. State vs. Bertul, 664 P.2d 1181 (Utah, 1983) held that for evidence to be admissible as a business record a proper foundation must be laid to establish the necessary induciae of reliability, which foundation should generally include the following:

> The record must be made in the regular course of the business or entity which keeps the records; the record must have been made at the time of, or in close proximity to, the occurrence of a conclusion that after recordation the document was kept under circumstances that would preserve its integrity; the sources of the information from which the entry was made and the circumstances of the preparation of the document were such that to suggest its trustworthiness.

There can be no question that Mr. Argyle could not possibly testify to all of those factors required by Bertul. The Court stated no reason for overruling Defendant/Appellant's objection. Clearly there was lack of proper foundation for admitting Exhibit Number Two, but if the Court finds the admission alone was insufficient to cause prejudicial error, the Court must keep in

mind that the combined affect of all the errors pointed out in this brief warrant a reversal of the conviction. See also Gold Laboratories Inc. vs. Lewis A. Rosar Co., 589 P.2d. 756 (Utah, 1978).

IV. Irrelevant and Prejudicial Testimony: On page 83 of the trial transcript, A. C. Ekker, over objection, testified as to previously reporting other cattle thefts, and that others have been apprehended for cattle rustling. Being such a small community, it was well known that Don Hatch, with whom it was widely rumored that Defendant/Appellant was a co-conspirator, was previously convicted of cattle rustling from the same area. Those questions allowed over objection gave rise to an inference that if Don Hatch was guilty then certainly the Defendant/Appellant was guilty. Such improper inference brought about by irrelevant and misleading questions was extremely prejudicial, and warrants reversal.

Rules 402 and 403 of the Utah Rules of Evidence preclude the introduction of irrelevant evidence, and evidence whose probative value is substantially outweighed by the danger of unfair prejudice confusion of the issues or misleading the jury. In Pearce vs. Wistisen, 701 P.2d 489 (Utah,1985), the Court stated,

> where evidence was shown to have supported only conjectural inferences which had little probative value, or where no evidence was introduced that showed that fact had any causal connection with Plaintiff's injury, reviewing Courts have reversed cases on grounds that they improperly admitted evidence could only have served to confuse or mislead the jury or prejudice the outcome of the case (citations omitted).

The Court engaged in thorough analysis of balancing the probative value against undue prejudice, citing Carlson vs. Piper Aircraft Corp., 646 P.2d 43 (OR, 1982) and Patricia R. vs. Sulivan, 631 P.2d 91 (Alaska,1981), and concluded: "the instant case was similarly fraught with the danger of dogmatic judgment." A small town jury was eager to protect themselves and their community from cattle rustling, and when reminded of previous convictions and reports of cattle theft, would tend to link the prior instances to Defendant/Appellant's conduct and thereby raise the inference of guilt. State v. Holder, 694 P.2d 583 (Utah, 1984), which ruled that the introduction of evidence concerning a prior robbery committed by the Defendant twenty minutes before his arrest for theft, was of margin probative value and unduly prejudicial. In accordance, State v. DeAllo, 748 P.2d 194 (Utah Ct. App. 1987), and Fisher v. Trapp, 748 P.2d 204 (Utah Ct. App. 1988).

The Court compounded its error on the second defense counsel's objection to evidence of prior apprehensions by stating at page 84 of the trial transcript: "Well the answer is already on the record. The objection is overruled." A judge could have, and should have instructed the jury to disregard the answer and sustained the objection. The Court in Pearce also admonished the trial judge for failing to make a distinction to the jury, and by overruling an objection to testimony. The Court, in analyzing whether the admitted testimony had a substantial influence in bringing about the verdict stated: "The jury's verdict could well have been the result of shifting it's attention away from the facts of the case

. . . " The misleading inference that was raised by the prosecutor's questions and the witnesses answers that Defendant/Appellant was connected with a prior convicted cattle rustler, definitely creates undue prejudice which outweighed the evidences minor probative value. Since very little other direct evidence was introduced indicating the cattle came from the Robbers Roost Allotment evidence of prior reports and apprehensions from said Allotment compounded the prejudicial affect, and was a substantial influence in bringing about the verdict.[1]

V. Improper Admission of Evidence and Improper Remarks by the Prosecutor of Prior Bad Acts and Offenses: At page 115 of the Trial Transcript the prosecution submitted Exhibits Four and Five into evidence[2] over Defendant/Appellant's objection. These Exhibits were the basis of a forgery and uttering of false documents charge that was dismissed by the Circuit Court. In responding to Defendant/Appellant's Motion to Suppress Said Evidence, the prosecution stated it will not be submitted as

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[1] The Court should keep in mind the only direct evidence submitted by the prosecution of where the cattle came from was that they were skinny and there was red sand on them. The alleged owner never even saw the cattle, and that the lay opinions of the prosecution witnesses were based on hearsay.

[2] Upon my review of the Court record in this case, the Court should be put on notice that the Exhibits appear to have been mis-marked and are incomplete. Defendant/Appellant's Exhibit Number Nine is missing, Exhibits Three and Six are missing, but what the transcript refers to as Exhibits Four and Five are marked Exhibits Three and Four. Exhibit Seven has been marked Exhibit Five and a copy that is also marked as Exhibit Six.

evidence of bad character. See Memorandum in Opposition to Motion to Suppress at pages 118 and 119 of the Record.

The preceding testimony of Mr. Argyle had indicated Defendant/Appellant purporting to be a friend of himself stated that the cattle were obtained by trade with the Indians. See Trial Transcript, page 113. Therefore the introduction of Exhibits Four and Five indicated to the jury that Defendant/Appellant may have been of bad character, by changing his story as to the origin of the cattle and by forging Bills of Sale. This indication was compounded further by the improper remarks in the prosecutor's closing statements that "not only is he guilty of this crime, but he is guilty of other crimes." See supplement to Motion for New Trial, paragraph five, at page 251 of the record. Since closing arguments are limited to matters that have been presented to the jury, the prosecutor must have been referring to the allegedly forged Bills of Sale that were introduced as Exhibits Four and Five, or the prior conviction of Don Hatch that Defendant/Appellant was rumored to be an accomplice with.

In State v. Tarafa, 720 P.2d, 1368 (Utah 1986), the Court reversed and remanded a conviction based on improper prosecutor's argument that referred to prior convictions and that demonstrated Defendant's criminal character. The Court cited State v. Troy, 688 P.2d, 483 (Utah 1984), which case in turn applied the two prong test set forth in State v. Valdez, 513 P.2d 422 (Utah 1973). The two prong test is whether the remarks called to the attention of the jurors matters which they would not be justified in considering

in determining their verdict, and that under circumstances of the particular case the jury was probably influenced by those remarks.

The Prosecutor's remark that Defendant/Appellant was guilty of other crimes would definitely not be permissible for the jury to consider in determining it's verdict as being violative of Rule 404(b) of the Utah Rules of Evidence. Given the weak direct evidence of ownership of the cattle in question, and no evidence of the time of the alleged theft of the cattle, the Prosecutor's remarks probably did influence the jury by bringing their attention to a prior criminal conviction of cattle rustling in which Defendant/Appellant was apparently an accomplice. When applying the second prong of the test, the Court in Tarafa stated, "the substantive use of Defendant's prior bad acts and felonies added greatly to the likelihood that the jury inferred guilty knowledge from the character of Defendant." The Court in Troy stated, similar to this case where there was not compelling proof of Defendant's guilty, and that the jury could have found either way, that they are compelled to find that the second step of the Valdez, test has been met. The jurors "Probably were influenced by" remarks of the Prosecutor. Similarly to those cases, the improper remarks of the Prosecutor and the introduction of Bills of Sale that were allegedly forged or altered could probably have influenced the jury and is grounds for a reversal of the conviction in this matter.

Rule 404(b) of the Utah Rules of Evidence provides "evidence of other claims, wrongs or acts is not admissible to prove the

character of a person in order to show that he acted in conformity therewith." In State v. Sanders, 699 P.2d 738, (Utah 1985), the court stated,

> Evidence of prior crimes is presumed prejudicial and, absent no reason for the admission of the evidence other than to settle criminal disposition, the evidence is excluded.

See State v. Starks, 581 P.2d 1015, (Utah 1978), where the Court stated, "Specific instances of misconduct that did not result in criminal convictions are inadmissible to impeach the witness." Evidence of a prior dismissed criminal complaint that followed testimony which was contradictory as to the origin of the cattle, and referred to as guilt of other crimes by the Prosecutor in his closing arguments, was a blatant attack on Defendant/Appellant's character, and in violation of Rule 404(b), Utah Rules of Evidence.

VI. Jury Bias and improper Conduct: The trial judge conducted its own voir dire of the jury, and at page 49 of the Trial Transcript, upon defense counsel's suggestion, the Court asked the Prosecutor and defense counselor to state their witnesses, and then asked if the jurors had any relationship between any of those witnesses. There was no response from the jury. Defendant/Appellant's counsel learned after the trial that one of the jurors had in fact worked for one of the key witnesses in the case, A. C. Ekker, and that another juror had previously been a law enforcement officer who had actually arrested one of the witnesses in the case, Don Hatch, for the identical offense for

which this Defendant was found guilty. See Defendant/Appellant's Supplement for Motion for New Trial, paragraph three at page 250 of the record. The Defendant/Appellant's counsel states in said motion that had voir dire been properly conducted, and that information disclosed, he would have asserted his pre-emptory challenge or challenge for cause on at least one if not both of those jurors. Defendant was ready to put on evidence concerning the bias of the jurors but was not allowed to. See Transcript of Motion for New Trial, etc., page 35. This issue was not even addressed in the Findings of FAct and Order Denying Motion in Arrest for Judgment and Motion for a New Trial found at page 257-259 of the record.

One of the fundamental principles of our system of justice which is guaranteed by both the United States and Utah State Constitutions, is the right of an accused to a fair and impartial jury. Due process also requires proper conduct of the judge, jury, and counsel during trial. In addition to the bias of two of the jurors mentioned above, some of the jurors apparently were friendly with A. C. Ekker and conversed with him during one of the recesses of the trial. See Trial Transcript page 302 and Supplement to Motion for New Trial, paragraph three, at page 250 of the record.

In State v. Brooks, 563 P.2d 799 (Utah, 1977), the Court stated that a showing of friendship between two jurors and the main prosecution witness was a sufficient showing of actual bias. In State v. Errickson, 674 P.2d (Utah, 1987), the Court stated

reversal of conviction and remand of case for new trial was required where a four or five minute conversation took place between juror and key witness for state. . ." And in State v. Pike, 712 P.2d 277 (Utah 1985), it was stated: "conversation between important prosecution witness, . . . was sufficient to warrant a presumption of prejudice on the part of the jurors justifying reversal of conviction, even if jurors had denied they influenced by the encounter in a Post Trial Hearing." Finally in State v. Velasquez, 672 P.2d 1254 (Utah, 1983), the Court reiterated the general rule that Defendant is entitled to fair and impartial trial based on evidence presented to jury, without jury being influenced by information from outside sources." These line of cases show there is a high degree of protection concerning jury bias and misconduct. This coupled with the argument why grounds exist for a change of venue and the prosecutions very weak evidence concerning ownership of the cattle, requires reversal of the conviction.

VII. Unconstitutionality of Section 76-6-412: This Statute places theft of animals regardless of their value as a third degree felony. Although in historical times theft of livestock was considered a much more serious crime and there were compelling reasons for creating a special class for such thefts, Defendant/Appellant contends those conditions no longer exists, and to continue to classify theft of livestock as a third degree felony

is creating a class that is unreasonable, arbitrary and discriminatory.

The evidence of this case show that there are modern day protections, i.e. the Brand Inspectors Office, that negates the need for a special classification for a theft such as this. The test of a Statute for purposes of equal protection is that the Statute must be grounded upon a rational basis, McGowan v. Marilyn, 366 U.S. 420, 81 S. Ct. 1101, 6L Ed. 2d 393 (1961). There is not a rational basis for distinguishing between a theft of a cow from a barn, for example, and theft of a piece of equipment from the barn of comparable value. The standard for finding the value of personal property and determine the degree of theft is the market value of the stolen items. State v. Logan, 563 P.2d 811 (Utah, 1977). There is no longer a rational basis for classifying theft of livestock as a third degree felony regardless of value, whereas all other types of theft are categorized on the basis of value. Although this issue was addressed and denied in State v. Clark, 632 P.2d 841 (Utah, 1981), Defendant/Appellant contends that given the modern safeguards that apply to the livestock industry, there no longer exists a rational basis for the discriminatory classification, and State v. Clark should be overruled.

VIII. Requirement of Original: The State's exhibits three and six were admitted, over Defendant/Appellant's objection, even though they were admittedly copies of the original, and the witness testified that the originals were easily obtainable. See Trial

Transcript pages 110 and 111. The witness stated in response to the prosecutors question if he had access to the originals that: "They have allowed me to do it. I could get a Court Order if I needed to, but the Auction Company allowed me to and they helped me find them in fact." (id. page 111 lines 2 through 5).

Rule 1002 of the Utah Rules of Evidence requires to prove the content of a witting the original is required. Exceptions to this rule are contained in Rule 1004 of the Utah Rules of Evidence, but none of those exceptions apply, in fact, the witness testified he could have easily obtained the original. Further there was no authentication of who made the copies elicited from the witness. If the Court finds the admission of this evidence was error, but of no prejudicial affect, the combined affect of this error with all others argued in this brief warrants a reversal.

IX. Insufficiency of and Variance of Information: Not only was there little direct evidence as to the ownership of the cattle or where it was taken, but the State also failed to provide direct evidence as to when the cattle were allegedly taken. Although Defendant/Appellant concedes the exact time need not be specific, Defendant/Appellant contends that there is a violation of his due process rights to not have the State prove with some degree of specificity the approximately time of taking. This is particularly true in light of the fact that Defendant/Appellant filed a Notice of Alibi indicating that he was not in the area prior to the alleged time of taking.

In McGuire v. Hayward, 666 P.2d 321,(Utah 1983), the Court stated,

> time is always an essential element of a crime in the sense that due process requires that an accused be given sufficient precise notification of the date of the alleged crime that he can prepare his defense.

The Court cited the United States Constitution Amendments V and XIV. When there was weak evidence of direct ownership, weak evidence as to where the cattle came from, and a Notice of Alibi filed with the Court, (see Notice of Alibi, pages 75-78 of the Record), the information was fatally defective for not setting forth the time of taking, and the State failed to prove said time during the trial. Such failure of proof warrants reversal of Defendant/Appellant's conviction.

Defendant/Appellant was also severely prejudiced by the State alleging in the information that the owner of the cattle was A. C. Ekker, when proof at trial indicated ownership of the cattle was really in a corporation called the Cross X Cattle Company. The defense had hired an investigator to investigate A. C. Ekker, not Cross X Cattle Company. See page 5 of the Transcript for Motion for New Trial, etc. In State v. Burnett, 712 P2d. 260 (Utah, 1985) involved a very similar situation where evidence showed that the theft was from someone other than that charged in the information. The Court said there plainly was a variance between the specifics of the crime charged in the information and the crime which the Court permitted the jury to convict. The Court reversed, stating the defense was not put on notice of the ownership and therefore

was prejudiced in the preparation of the defense. This was the argument the Motion For Arrest of Judgment, and said argument is set forth on pages 6, 7 and 8 of the Transcript denying said motion.

X. Separate Offenses: Defendant/Appellant was charged with 8 separate counts of theft of cattle, although the Prosecution failed to put on any evidence of different facts or elements of proof for each count. Multiplicity has not been extensively addressed in the Utah Courts, however, the Kansas Courts have reviewed and defined the term. In State v. Wilson, 728 P.2d 1332, (Kan. App. 1986), the Court stated: "multiplicity in criminal action is charging of single offense in several counts." State v. Jackson, 543 P.2d 901, (Kan. 1975), the Court stated: "test to be applied in determining the identity of offenses is whether it requires proof of fact which is not required by others." In accord, see State v. Pierce, 469 P.2d 308 (Kan. 1970). This test was further refined in State v. Hicks, 714 P.2d 105, (Kan. App. 1986), where the Court stated:

> test to determine whether charges are in fact multiplicitious is whether one offense requires proof of element not necessary to prove other offenses; if so, charges stemming from single act are not multipicitious.

Finally, the Kansas Appellant Court stated in State v. Hill,706 P.2d 472, (Kan. App.1985),

> Multiplicity which is charging of a single offense in several counts is prohibited because a single wrongful act cannot furnish basis for more than one criminal prosecution.

Section 76-1-401 Utah Code Ann. states:

> single criminal episode means all conduct which is closely related in time and is significant to an attempt or an accomplishment of a single criminal objective.

In State v. Bair, 671 P.2d 203,(Utah 1983), the Utah Supreme Court stated:

> retention of stolen property of different individuals is a single act and a single offense where evidence shows that the items were retained simultaneously.

The Supreme Court reversed a conviction on the grounds that Defendant had previously been tried for the same criminal episode, and the Court undertook a thorough review of opinions concerning the issue of whether a single criminal episode or separate offenses occurred. The Court cited State v. Clark, 497 P.2d 1210, (Or. 1972), where that Court states:

> if the State contended that the articles were received or concealed by the Defendant on separate occasions, it was incumbent upon it to offer evidence to that affect. It did not do so.

The Utah Court in Bair concluded the State did not establish that Defendant received the stolen property on separate occasions. Similarly here, there was no evidence that the cattle was taken at different times in fact, as argued infra, the State failed to specifically allege the date of taking.

Defendant/Appellant is prejudiced by being charge with multiple counts, and thereby face up to 8 times the amount of fines and amount of possible jail time. This was argued by Defendant/Appellant in his Motion to Allege One Third Degree Felony, (see Record, pages 90-93) and in his Motion to Dismiss made

at trial, at page 155 of the Trial Transcript. There it was pointed out that the same Prosecutor had previously prosecuted and assisted in the conviction of a witness of Defendant/Appellant, Don Hatch, and in that case, there were 7 head of cattle taken, only one count charged. Defense counsel also points out on page 156 that historically every record in that particular County contained only one charge. Grounds exist for a reversal or at least a remand of this matter to be properly tried under one count in absence of proof of separate facts or elements.

CONCLUSION

Defendant/Appellant's conviction was based on heresay evidence, innuendo, and as a result of a biased jury. The prosecution did not prove where the cattle were taken, when the cattle were taken, or who the cattle were taken from. The only slim evidence of where the cattle were taken was the mere presence of red sand on the cattle, and the alleged victim never even saw the cattle. Evidence as to prior apprehensions and reports of cattle thefts from the alleged victim was improperly admitted before the jury, and the jury improperly inferred that the conviction of Don Hatch, who was rumored to be an accomplice with Defendant/Appellant, meant Defendant/Appellant must be guilty. For these reasons, plus other arguments set forth in the brief, Defendant's conviction should be reversed.

In the event this Court does not feel reversal of the conviction is appropriate, the following reasons constitutes grounds for at least a remand of the matter and a new trial. Defendant/Appellant was improperly charged and sentenced with 8 counts of cattle theft, rather than a single count; heresay, lay opinion, and evidence without foundation was improperly admitted over objection; jurors conversed with the witness during the course of the proceedings; and improper remarks by the prosecution prejudiced Defendant/Appellant.

As argued above, numerous sound reasons exist for reversal of Defendant/Appellant's conviction, or in the very least, a remand for a new trial before an unbiased jury.

Respectively submitted this 22nd day of February, 1990.

Phil Hansen
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I herewith certify that a true and correct copy of the foregoing BRIEF OF APPELLANT was caused to be served upon the following:

Utah State Attorney
General's Office
236 State Capitol
Salt Lake City, UT 84114

and

Tex R. Olsen, Esq.
Wayne County Attorney
225 North 100 East
Richfield, UT 84701

by depositing a properly addressed envelope containing the same in the United States Mail, first class postage prepaid, this 22nd day of February, 1990.

Phil Hansen

ADDENDUM

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VIII

[Bail — Punishment.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section
1. [Citizenship — Due process of law — Equal protection.]
2. [Representatives — Power to reduce appointment.]
3. [Disqualification to hold office.]
4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
5. [Power to enforce amendment.]

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

CONSTITUTION OF UTAH

ARTICLE I

DECLARATION OF RIGHTS

Sec. 7. [Due process of law.]
No person shall be deprived of life, liberty or property, without due process of law. 1896

Sec. 9. [Excessive bail and fines — Cruel punishments.]
Excessive bail shall not be required; excessive fines shall not be imposed, nor shall cruel and unusual punishments be inflicted Persons arrested or imprisoned shall not be treated with unnecessary rigor. 1896

Sec. 12. [Rights of accused persons.]
In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed The accused shall not be compelled to give evidence against himself, a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense. 1896

Sec. 24. [Uniform operation of laws.]
All laws of a general nature shall have uniform operation 1896

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury, and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

78-13-9. Grounds.

The court may, on motion, change the place of trial in the following cases:

(1) when the county designated in the complaint is not the proper county.

(2) when there is reason to believe that an impartial trial cannot be had in the county, city, or precinct designated in the complaint.

(3) when the convenience of witnesses and the ends of justice would be promoted by the change.

(4) when all the parties to an action, by stipulation or by consent in open court entered in the minutes, agree that the place of trial may be changed to another county. Thereupon the court must order the change as agreed upon. 1953

76-6-412. Theft — Classification of offenses — Action for treble damages against receiver of stolen property.

(1) Theft of property and services as provided in this chapter shall be punishable as follows:

(a) As a felony of the second degree if:

(i) The value of the property or services exceeds $1,000; or

(ii) The property stolen is a firearm or an operable motor vehicle; or

(iii) The actor is armed with a deadly weapon at the time of the theft; or

(iv) The property is stolen from the person of another.

(b) As a felony of the third degree if:

(i) The value of the property or services is more than $250 but not more than $1,000; or

(ii) The actor has been twice before convicted of theft of property or services valued at $250 or less; or

(iii) When the property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, or poultry.

(c) As a class A misdemeanor if the value of the property stolen was more than $100 but does not exceed $250.

(d) As a class B misdemeanor if the value of the property stolen was $100 or less.

(2) Any person who has been injured by a violation of Subsection (1), of Section 76-6-408 may bring an action against any person mentioned in (d) for three times the amount of actual damages, if any sustained by the plaintiff, costs of suit and reasonable attorneys' fees. 1977

76-1-401. "Single criminal episode" defined — Joinder of offenses and defendants.

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of Section 77-21-31 in controlling the joinder of offenses and defendants in criminal proceedings. 1975

-35-17. Rule 17 — The trial.

(a) In all cases the defendant shall have the right appear and defend in person and by counsel. The fendant shall be personally present at the trial ith the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may quire the personal attendance of the defendant at ie trial

(b) Cases shall be set on the trial calendar to be ied in the following order:

(1) Misdemeanor cases when defendant is in custody;

(2) Felony cases when defendant is in custody;

(3) Felony cases when defendant is on bail or recognizance; and

(4) Misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the efendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury nless the defendant makes written demand at least n days prior to trial, or the court orders otherwise. o jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial ry shall be as specified in Section 78-46-5.

(f) In all cases the prosecution and defense may, ith the consent of the accused and the approval of ie court, by stipulation in writing or made orally in en court, proceed to trial or complete a trial then in ogress with any number of jurors less than otherise required.

(g) After the jury has been impanelled and sworn, the trial shall proceed in the following order:

(1) The charge shall be read and the plea of the defendant stated;

(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;

(3) The prosecution shall offer evidence in support of the charge;

(4) When the prosecution has rested, the defense may present its case;

(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;

(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury, and

(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return

them into court without unnecessary delay or at a specified time

(j) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(k) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits and papers which have been received as evidence, except depositions, and each juror may also take with him any notes of the testimony or other proceedings taken by himself, but none taken by any other person

(l) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon

(m) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given Such response shall be recorded The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and response thereto shall be entered in the record.

(n) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(o) At the conclusion of the evidence by the prosecution, or at the conclusion of all of the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

'7-35-18. Rule 18 Selection of jury.

(a) The clerk shall draw by lot and call the number of the jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy before further challenges are made, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, in the order in which they appear on the list, and the persons whose names are so called shall constitute the jury.

(b) The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant.

(c) A challenge may be made to the panel or to an individual juror.

(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

(i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.

(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or recorded by the reporter. It shall specifically set forth the facts constituting the grounds of the challenge.

(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense.

(d) A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) The challenge for cause is an objection to a particular juror and may be taken on one or more of the following grounds:

(1) Want of any of the qualifications prescribed by law;

(2) Any mental or physical infirmity which renders one incapable of performing the duties of a juror;

(3) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted;

(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because he is indebted to or employed by the state or a political subdivision thereof;

(5) Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by him in a criminal prosecution;

(6) Having served on the grand jury which found the indictment;

(7) Having served on a trial jury which has tried another person for the particular offense charged;

(8) Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;

(9) Having served as a juror in a civil action brought against the defendant for the act charged as an offense;

(10) If the offense charged is punishable with death, the entertaining of such conscientious opinions about the death penalty as would preclude the juror from voting to impose the death penalty following conviction regardless of the facts;

(11) Because he is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where the defendant is charged with a like offense;

(12) Because he has been a witness, either for or against the defendant on the preliminary examination or before the grand jury;

(13) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged; or

(14) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

(f) Peremptory challenges shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(g) The court may direct that alternate jurors be impanelled. Alternate jurors, in the order in which they are called, shall replace jurors, who are, or become, unable or disqualified to perform their duties. The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen.

Alternate jurors shall have the same qualifications, take the same oath and enjoy the same privileges as regular jurors.

(h) A statutory exemption from service as a juror is a privilege of the person exempted and is not a ground for challenge for cause.

(i) When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict

77-35-19. Rule 19 — Instructions.

(a) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally, or otherwise waive this requirement.

(b) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused.

(c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

(d) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(e) Arguments of the respective parties shall be made after the court has instructed the jury. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court. 1980

77-35-24. Rule 24 — Motion for new trial.

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

(b) A motion for a new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.

(c) A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten day period.

(d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either

77-35-29. Rule 29 — Disability and disqualification of a judge or change of venue.

(e) (i) If the prosecution or a defendant in a criminal action believes that a fair and impartial trial cannot be had in the jurisdiction where the action is pending, either may, by motion, supported by an affidavit setting forth facts, ask to have the trial of the case transferred to another jurisdiction.

(ii) If the court is satisfied that the representations made in the affidavit are true and justify transfer of the case, the court shall enter an order for the removal of the case to the court of another jurisdiction free from the objection and all records pertaining to the case shall be transferred forthwith to the court in the other county. If the court is not satisfied that the representations so made justify transfer of the case, the court shall either enter an order denying the transfer or order a formal hearing in court to resolve the matter and receive further evidence with respect to the alleged prejudice.

UTAH RULES OF EVIDENCE

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state Evidence which is not relevant is not admissible

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

Rule 701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by law or by these rules